STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2005
v	No. 256062 Oakland Circuit Court
ANTHONY DELGADO, Defendant-Appellant.	LC No. 2003-193995-FH

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of first-degree retail fraud, MCL 750.356c, second or subsequent offense, and his plea-based conviction of driving with a suspended license (DWLS), second or subsequent offense, MCL 257.904(1) and (3)(b). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to terms of two to twenty years for the retail fraud conviction and 118 days for the DWLS conviction. We affirm.

I

This case stems from an incident on December 17, 2003, in which a Troy police sergeant, David Livingston, was patrolling the Oakland Mall and observed defendant and another man, Reynaldo Benavides, park a pick-up truck, enter the Sears store separately, and leave with boxes of merchandise, apparently without paying for them. Defendant was the driver of the truck. Livingston saw defendant carrying a large green and black cardboard box to the escalator and later placing the box in the back of the truck, which was covered with a cap. Benavides was observed placing a box with a DVD player under his arm, walking out of the store, and loading it into the back of the truck. Defendant then drove away with Benavides in the passenger seat. When the police stopped the vehicle a short time later, the box carried out by defendant contained a ten-piece set of pots and pans valued at $389.99. Defendant indicated that he did not have a receipt for the merchandise. The box carried out by Benavides contained a DVD recorder valued at $399.99.

Kimberly Gaylor, the loss prevention manager at Sears, provided computer printouts showing that there were no sales of the merchandise taken from the store on December 17, 2003. After taking pictures of the stolen boxes of merchandise, the police returned the merchandise to Sears.

II

Defendant argues that he was denied his right to a fair trial by the prosecutor's misconduct during closing argument. Defendant objected to the alleged misconduct, but no ruling was issued by the trial court. We find no error requiring reversal.

Claims of prosecutorial misconduct are reviewed case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002); *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). Defendant claims error in the prosecutor's rebuttal argument, which responded to defense counsel's argument that the prosecution failed to produce the actual boxes of merchandise that were allegedly shop-lifted. In rebuttal, the prosecutor stated:

> Counsel wants me to prove something more. Since I've proved that, he wants to try and pile on and say you can't convict, if the prosecutor doesn't bring the boxes in. You can't convict if he doesn't show you a video. You got to bring the box, you got to have the video and they should have had another officer in plain clothes following him. You know what, if I brought all those things in, his closing statement would have been where are the fingerprints, why didn't they fingerprint the boxes? Where's the DNA? No matter what I bring in --

Defendant argues that the prosecutor's argument was error because it exceeded the facts and any reasonable inferences, improperly expressed the prosecutor's personal opinion, was unnecessary to answer defense counsel's argument, and was not an "invited response." He also argues that the argument shifted the burden of proof by implying that defendant had a burden to disprove the prosecution case.

Plaintiff argues that the prosecutor's comments in rebuttal fall within the doctrine of "fair response"[1] to issues raised by the defense and did not deny defendant a fair trial. We agree. Under the doctrine of fair response, "a party is entitled to fairly respond to issues raised by the other party." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). With respect to such response by the prosecution in a criminal trial, our Supreme Court has explained that:

> [t]he nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence. [*People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995).]

[1] The doctrine of "fair response" is closely related to that of "invited response," but does not involve error because a party is entitled to fairly respond to issues raised by the other party. *Jones*, *supra* at 352 n 2. The doctrine of "invited response," however, involves error and considers whether the error, which otherwise might require reversal, is shielded from appellate relief in light of the invitation and the proportionality of the response, e.g., a prosecutor's introduction of a polygraph examination. *Id*. at 352 n 6, 353.

In this case, during trial, defense counsel objected to the prosecutor's argument on the ground that it was conjecture regarding what defense counsel would have argued given an entirely different set of circumstances. Although defendant now challenges the argument on different grounds, we find none of the grounds asserted a basis for finding error. The prosecutor's argument was a fair response to issues raised by defense counsel in his closing argument.

In his closing argument, defense counsel repeatedly questioned the prosecution's failure to produce certain evidence:

> [Sergeant Livingston] doesn't know, he said he doesn't know where my client went to, where the defendant went to, he just went someplace else and he didn't follow him because he was looking at Mr. Benevetes (sic). If he was so concerned that my client was going to do anything wrong, why didn't he go ahead and have another plain clothes officer follow my client?
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> * * *
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> Where is the surveillance video as to the defendant or the other person in that matter in this case. Where is it? Why is it so conveniently not working when the defendant is the one being arrested? Why? How do we know it wasn't working? All we know is that there is no video of my client doing anything . . . .
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> * * *
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> And if they are so concerned about these boxes that were allegedly taken, where are the boxes? Where are the boxes? Wouldn't you want to see the box rather than seeing a little picture this big of one part of the box. Don't you think you'd want to see the boxes that they are talking about presented in front of you? I mean, isn't that the best evidence of what they are trying to show?
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> * * *
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> [Sergeant Livingston] has no idea what was inside the defendant's truck when he saw the defendant's vehicle park. He has no idea. He doesn't know if this box was there when he came in or not and all I'm saying is that the prosecutor has to prove guilt beyond a reasonable doubt and you can't build a case on conjecture and he's going to go ahead and the prosecutor is going to indicate that these Exhibits that were introduced show all of these things, but you look at them. He's going to conjecture as to what they show the same as you're going to conjecture. So what if you have blank spaces? So what and if you have identifying marks on the box or you have item numbers on the box that will correspond with the numbers on these Exhibits to show that it wasn't taken, bring the boxes in, let's see the boxes. Let's see if the boxes correspond to the prices that they have here. Let's see if the boxes correspond to what they are talking about. Let's see if the prices were on these boxes. Let's see if they match. I mean, all we're doing is dabbling over here. We're conjecturing as to what may have occurred. We're conjecturing as do the prices match the box, do the numbers on the boxes match

> the Exhibits 2 and 3 and it could have very easily have been resolved by just bringing in the boxes that were taken, matching the numbers on the boxes that were taken with the numbers on the price tags. Just because they say they match doesn't mean anything; bring them in. Bring them in. They are not here.

The prosecutor's comments in rebuttal were a fair response to the issues raised by defense counsel. Where a defendant advances an alternate theory of the case that, if true, would exonerate him, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. *Fields, supra* at 115. Moreover, in this case, the prosecutor began his rebuttal by expressly agreeing with defense counsel that it was the prosecutor's burden to prove the elements of retail fraud. The prosecutor's subsequent argument merely commented on the weakness of defendant's theory or its improbability, which was not improper. *Fields, supra* to 115-116.

III

Defendant argues that the trial court committed error requiring reversal in failing to give a "missing evidence" or "adverse inference" instruction. We disagree.

Defendant contends that an adverse inference instruction was warranted on the basis of the missing evidence referenced in his closing argument. If the prosecutor fails to preserve material evidence, the jury may infer that the evidence would have been favorable to the defendant *People v Cress,* 250 Mich App 110, 157-158; 645 NW2d 669, vac'd in part on other grds 466 Mich 883; 646 NW2d 469 (2002), rev'd on other grds 468 Mich 678; 664 NW2d 174 (2003); *People v Davis,* 199 Mich App 502, 514-515; 503 NW2d 457 (1993). However, defendant concedes that the defense did not request the instruction, and furthermore, counsel expressed satisfaction with the instructions provided by the court. Because defendant expressed satisfaction with the jury instructions as given, he may not now claim error in this regard. *People v Carter,* 462 Mich 206, 214-215; 612 NW2d 144 (2000); *People v Matuszak,* 263 Mich App 42, 48; 687 NW2d 342 (2004).

To the extent that defendant argues that counsel was ineffective for failing to request a "missing evidence" instruction, this issue is abandoned because it was not raised in the statement of the questions presented. Independent issues not raised in the statement of questions presented are not properly presented for appellate review. *People v Brown,* 239 Mich App 735, 748; 610 NW2d 234 (2000).

In any event, we agree with plaintiff that counsel was not ineffective for failing to request the instruction. The merchandise was returned to Sears, and testimony established that if the items had been held for trial, they might depreciate in value. There was no indication that the police acted in bad faith in failing to preserve the evidence, or that the items would have been exculpatory. *Davis, supra*. Because defendant has not shown that he was entitled to the instruction, he has not shown that counsel was ineffective for failing to request the instruction. *People v Fike,* 228 Mich App 178, 182; 577 NW2d 903 (1998).

Because defendant has failed to show that a "missing evidence" instruction was required, we need not address his argument that failure to give the missing evidence instruction was

structural error that requires automatic reversal. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). Nonetheless, we find this argument unpersuasive.

IV

Defendant raises two claims of sentencing error. We find neither claim a basis for relief.

A

Defendant argues that the trial court erred in scoring offense variable 13 (OV 13) (continuing pattern of criminal behavior) at 25 points. We find no error.

This Court reviews issues concerning the proper scoring of sentencing guidelines variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision will not be reversed if any evidence exists to support it. *Id*.

In scoring OV 13, the court is required to score twenty-five points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). MCL 777.43(2)(a) further provides:

> For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant argues that because he did not have convictions of three or more crimes against a person within a five-year period *immediately preceding* the sentencing offense, the trial court erred in scoring OV 13 at twenty-five points. Defendant's argument was rejected in *People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2003). The Court held that the use of the indefinite article "a" reflects that no particular period is referred to in the statute. Scoring may therefore be based on a five-year period that does not include the sentencing offense. *Id*.

B

Defendant argues that the trial court erred in imposing a sentence of two to twenty years' imprisonment because the sentence was excessive. We disagree.

Defendant challenges his sentences on various grounds. Because defendant failed to raise his challenges at sentencing or in a motion for resentencing, our review of his claims is limited to plain error affecting substantial rights. *People v Wyrick*, ___ Mich App ___; ___ NW2d ___ (Docket No. 250776, issued March 22, 2005, slip op pp 3-4; *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). We find no plain error affecting defendant's substantial rights.

Defendant was sentenced as a fourth-habitual offender. His minimum sentence was within the recommended sentencing guidelines range and must therefore be affirmed. In general, under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-311; 684

NW2d 669 (2004); *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003). We find no plain error that warrants deviation from the general rule.

Defendant argues that he was entitled to be sentenced before a different judge pursuant to an order of the chief judge following defendant's complaint in propria persona concerning his trial judge. He faults defense counsel for failing to object to sentencing before the trial judge and contends that an evidentiary hearing is necessary to determine whether his sentence was based on judicial bias or vindictiveness. We find no plain error affecting defendant's substantial rights. The sentence guidelines minimum range was fourteen to fifty-eight months. Defendant's minimum sentence of two years was within the guidelines range. In imposing sentence, the court considered defendant's past history, his failure to recognize the wrongfulness of stealing, and in particular, that defendant had thirteen prior felonies and ten prior misdemeanors. The record reflects no judicial bias or vindictiveness on the part of the sentencing judge to warrant her disqualification. *People v Wells*, 238 Mich App 383, 391-392; 605 NW2d 374 (1999).

Defendant also argues that the court failed to assess defendant's rehabilitative potential, and failed to articulate a reason that the maximum sentence of twenty years was proportionate to the offense and the offender. Further, defendant's sentence constitutes cruel and unusual punishment. Because the court appropriately considered the circumstances surrounding the offense and the offender and imposed a sentence within the sentencing guidelines range, these arguments are without merit. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), lv gtd in part on other grounds 472 Mich 881; 693 NW2d 823; *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003).

Defendant argues that his sentence was unconstitutional because the jury verdict did not encompass all the findings made by the trial court in sentencing defendant, *Blakely v Washington*, 542 US___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court explained in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* is inapplicable to Michigan's guideline scoring system. That determination constitutes binding precedent on this Court. *Drohan, supra* at 89 n 4, lv gtd.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff